

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2858-FT

Cir. Ct. No. 2007SC1881

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SADIE SCHROEDER,

PLAINTIFF-RESPONDENT,

V.

JEFFREY LONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 NEUBAUER, J.¹ In this small claims action, Jeffrey Long appeals a judgment entered in favor of Sadie Schroeder, his former fiancée. The trial court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version.

ruled that improvements Long made to Schroeder's home during their engagement did not support his counterclaim for unjust enrichment. We agree and affirm.

¶2 In July 2005, Schroeder loaned Long approximately \$3699 to pay for improvements on property Long owned. Schroeder agreed to forego reimbursement of the loan if, by December 31, 2007, she and Long were married and living on the property, and Long agreed to repay Schroeder in full if their relationship ended. The parties memorialized their agreement in writing.

¶3 In September 2005, using money from her father's estate, Schroeder bought a house with virtually no kitchen. Long, a general contractor, had access to some cabinets removed from a building project. He and an employee installed the cabinets, as well as countertops, a sink and faucets. Long valued the items at over \$5800, excluding labor, but charged Schroeder nothing. Around this time, the parties became engaged.

¶4 Sometime thereafter, but before December 2007, the parties permanently ended their engagement. When Long did not comply with Schroeder's written request to fully repay the \$3699, Schroeder filed this small claims action against him. Long's position was that the property he installed was in repayment of the loan or, alternatively, that it was a conditional gift made in anticipation of marriage, which she must now either return or reimburse him for. The trial court ruled in favor of Schroeder and dismissed Long's counterclaim, finding that Long gifted the items to her.

¶5 On appeal, Long does not dispute his loan obligation to Schroeder. He asks instead that we reverse the portion of the judgment dismissing his counterclaim for unjust enrichment and either grant his claim or remand for more factual findings as to whether the gift was conditioned upon the marriage.

¶6 The parties disagree on our standard of review. Long asserts that whether the installed property was a conditional gift presents a question of law because it entails determining whether the facts satisfy a legal standard. *See Waage v. Borer*, 188 Wis. 2d 324, 328, 525 N.W.2d 96 (Ct. App. 1994). Schroeder, on the other hand, contends we must review whether or not credible evidence supports the trial court's finding that a gift took place.

¶7 A trial court's decision to grant equitable relief in an action for unjust enrichment is discretionary. *See Ulrich v. Zemke*, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458. We sustain discretionary decisions if the trial court examined the relevant facts, applied a proper standard of law and, using a rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Whether the trial court used the proper legal standard is a question of law we review de novo. *See Waage*, 188 Wis. 2d at 328.

¶8 Findings of fact made by a trial court without a jury will be upheld on appeal unless they are clearly erroneous. *Ulrich*, 258 Wis. 2d 180, ¶8; *see* WIS. STAT. § 805.17(2). When reviewing fact finding, we search the record for evidence to support findings reached by the trial court, not findings the trial court could have reached but did not. *Covelli v. Covelli*, 2006 WI App 121, ¶14, 293 Wis. 2d 707, 718 N.W.2d 260. We may assume a missing finding was determined in favor of the judgment. *State v. Phillips*, 218 Wis. 2d 180, 199 n.7, 577 N.W.2d 794 (1998). The weight and credibility given the testimony is uniquely within the province of the trial court. *Covelli*, 293 Wis. 2d 707, ¶14.

¶9 Long maintains that Schroeder was unjustly enriched because the cabinets he installed in her home were a gift conditioned upon their anticipated

marriage. Long contends that when a gift of property is conditioned upon a subsequent marriage, the only relevant inquiry is whether the condition under which the gift was made has failed. See **Brown v. Thomas**, 127 Wis. 2d 318, 327, 379 N.W.2d 868 (Ct. App. 1985), *abrogation on other grounds recognized*, **Koestler v. Pollard**, 162 Wis. 2d 797, 804 n.4, 471 N.W.2d 7 (1991). He also asserts that “the condition may be implied in fact or imposed by law in order to prevent unjust enrichment.” See *id.* at 327. Schroeder responds that no condition was attached to the gift, as shown by Long’s various statements that he gave her the cabinets to cancel the debt.

¶10 A conditional gift is one subject to the performance of some act by the recipient, and the donor may recover the gift if the recipient does not fulfill the condition. *Id.* A valid gift *inter vivos*, by contrast, or an “absolute gift,” occurs where a gift of personal property is made with the intent to take effect irrevocably and is fully executed by unconditional delivery. *Id.* at 326-27. An absolute gift cannot be revoked. *Id.*

¶11 Long argues that unjust enrichment is a proper remedy for Schroeder’s retention of the property. Unjust enrichment requires proof of three elements: (1) a benefit conferred on the defendant by the plaintiff, (2) the defendant’s appreciation or knowledge of the benefit, and (3) the defendant’s acceptance or retention of the benefit where circumstances make it inequitable to do so. **Watts v. Watts**, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987).

¶12 The issue really is Long’s donative intent, a fact question, see **Derr v. Derr**, 2005 WI App 63, ¶27, 280 Wis. 2d 681, 696 N.W.2d 170, which must be inferred from Long’s acts and statements in view of the surrounding circumstances. See **Pfeifer v. World Serv. Life Ins. Co.**, 121 Wis. 2d 567, 569,

360 N.W.2d 65 (Ct. App. 1984). Long testified at several junctures at the bench trial that he gave Schroeder the cabinets to cancel the loan debt and that they had a verbal agreement to that effect. He also testified that he convinced his business partner that giving the cabinets to Schroeder would be better than taking money from the business should he “ever [be] held accountable for the debt that she was asking for.” Long acknowledged being experienced in business contracts but chose not to draw up anything in writing.

¶13 Schroeder testified that she and Long planned to build a log house on the land Long owned. She testified that she cleared brush from the site, cleaned a pond and restocked it with fish and plants, and helped Long fell, debark and haul trees, all without compensation as part of their future plans. Schroeder testified that she and Long had no understanding that she was to reimburse him for improvements to her house.

¶14 The trial court found that Schroeder legally protected her loan to Long by a contract; that Long is a sophisticated businessman who knows the effect of contracts; that Long chose not to use a contract although he had the knowledge and wherewithal to protect his interest in that manner; and that “there were giftings going back and forth in the form of Ms. Schroeder’s labor on the land that they intended to build their home on and Mr. Long’s fixing up of a house that I’m guessing the parties intended to be sold.” Long argues that, since the gift more or less coincided with the engagement, it would have been “unseemly” to place an express condition on the gift. His position may be sensible. Nonetheless, a factual basis exists for the court’s inference that Long did not intend the cabinet installation to be a gift conditioned on marriage. The inference is reasonable, and we must accept it. *See State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

¶15 The record supports the trial court's implicit finding that the cabinets were not a conditional gift. A finding of an absolute gift defeats a claim for unjust enrichment. We therefore see no erroneous exercise of discretion in denying Long's counterclaim.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

